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CABLE TELEVISION
AMERICA'S CABLE
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C-SPAN

Bruce Collins

Vice President and General Counsel

May 15, 1996

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Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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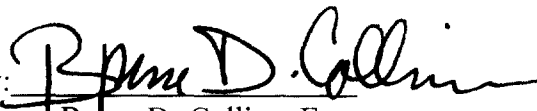
Re: Implementation of Sections of the Cable Television Consumer
Protection and Competition Act of 1992; CS Docket No. 96-60

Dear Mr. Caton:

Enclosed are 12 copies of National Cable Satellite Corporation's
comments in the above-referenced proceeding.

Respectfully Submitted,

NATIONAL CABLE SATELLITE CORP.

By: 

Bruce D. Collins, Esq.
Corporate Vice President and
General Counsel

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
)
Implementation of Sections of the Cable)
Television Consumer Protection and)
Competition Act of 1992:) CS Docket No. 96-60
)
Rate Regulation)
)
Leased Commercial Access)

To: The Commission

**COMMENTS OF C-SPAN AND C-SPAN 2
(National Cable Satellite Corporation)**

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May 15, 1996

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To: The Commission

**COMMENTS OF C-SPAN AND C-SPAN 2
(National Cable Satellite Corporation)**

I. INTRODUCTION and SUMMARY

C-SPAN and C-SPAN 2 (the "C-SPAN Networks") are fulltime satellite delivered public affairs television programming services available primarily via cable television, and devoted entirely to information and public affairs, including the live gavel-to-gavel coverage of the proceedings of the U.S. House of Representatives (on C-SPAN), the U.S. Senate (on C-SPAN 2) and a variety of other events at public forums around the country and the world.¹ The C-SPAN Networks are produced and distributed by the National Cable Satellite Corporation ("NCSC"), a non-profit and tax-exempt District of Columbia corporation.

¹ C-SPAN is available in over 67.1 million households. C-SPAN 2 is available in over 44.4 million households.

In our comments on the above-captioned *Further Notice of Proposed Rulemaking* (the *Notice*), we do not attempt to address every issue raised in the Commission's rulemaking on Leased Commercial Access ("LCA"). Instead, we describe why *any* expansion of LCA (as proposed in the *Notice*) will result in significant carriage loss for the C-SPAN Networks, and how that result advances neither Congressional intent nor the public interest.²

II. AN UNINTENDED CONSEQUENCE OF LCA: IT IS THE LATEST IN A STRING OF GOVERNMENTAL ACTIONS THAT HAVE FRUSTRATED C-SPAN'S WIDELY ACKNOWLEDGED SERVICE OF THE PUBLIC INTEREST

The private sector founders of the C-SPAN Networks did on their own what government has been prodding television producers to do almost since the beginning of the industry: produce quality programming that also serves the public interest, convenience and necessity. Yet despite the praise the C-SPAN Networks' public service programming has received from its audience and from public officials at all levels³ since 1979, government has unintentionally erected a series of substantial barriers to our ability to reach the public.

For example, the must carry rule contained in the 1992 Cable Act was the direct cause of about 3.9 million cable television households receiving less of the C-SPAN Networks than if the rule had never been imposed. Even today, after vigorous and sustained efforts to regain lost carriage on cable systems with limited channel capacity, the C-SPAN Networks' carriage

² We make additional comments addressing our broader concerns with leased access in *Joint Comments of Turner Broadcasting System, Inc., News Corp. Ltd., and C-SPAN on Further Notice of Proposed Rulemaking*, submitted today.

³ A recent example of such praise is contained in the remarks of Vice President Gore at the National Cable Television Association's 1996 annual convention in Los Angeles during which he described C-SPAN as "a national treasure" that "must be preserved."

remains either diluted or absent altogether in at least 1,076,000 households due to must carry.⁴ This harm to our public service efforts is also continuing and unpredictable. For example, holders of long-dormant broadcast licenses have come out of nowhere to make carriage demands that would never have been made had not the must carry rule created new value for them. And, at any time a distant licensee within an ADI may eventually employ a non-broadcast technology to deliver a good signal to the cable operator's headend, thereby justifying a carriage demand under the rule. Finally, petitions to modify the ADIs to add must carry stations may also arise at any time, putting further pressure on C-SPAN's carriage chances.

Government may have intended with must carry to serve the public interest, but the practical effect in too many television markets has been that viewers lost the ability to see their government in action on C-SPAN in order gain the right to watch identical broadcast programs on several channels at the same time.

The 1992 Cable Act's retransmission consent provision has had a similar effect on our carriage. It created strong economic incentives that encourage the allocation of limited channel capacity to other users, regardless of the actual effect on the public interest. As a result C-SPAN and C-SPAN 2 were often supplanted in favor of programming services that would not even have been created but for retransmission consent, and for which there was therefore absolutely no public demand. As with must carry, the harm was real (we suffered loss of carriage to over 1.15 million households directly attributable to retransmission consent)

⁴ NCSC has advanced these complaints and others as a co-plaintiff in a legal challenge to the constitutionality of the must carry rule on First Amendment grounds (*Turner, et al v. FCC*), now awaiting oral argument at the U.S. Supreme Court.

and, it will continue. Indeed, this coming October and every three years thereafter, we expect to face even more threats to carriage as broadcasters make their must carry/retransmission consent elections known to cable operators.

Our efforts at serving the public have also been thwarted by the statutory right of cable franchisors to bargain for the so-called PEG (public, educational and government) channels. Although the PEG requirement may be regarded as benign and in direct service to the public, it is nevertheless another instance where C-SPAN's chance of carriage is reduced by governmental regulation without necessarily achieving the regulatory purpose. In too many instances, for example, C-SPAN (much less C-SPAN 2) can not find space even on a cable system where some or all of its required PEG channels are completely dark or barely used.

Even in the non-cable universe, we have been inadvertently punished for advancing the public interest in the wrong way. We have sought, for example, to be carried on microwave services where channels have been reserved for ITFS (instructional television fixed service). But the narrowly drawn rules (focusing on classroom instruction), simply will not permit the fulltime carriage of our programming. Despite changes made late last year to give ITFS operators more flexibility in using their channels to serve the public interest, neither of the C-SPAN Networks may yet be carried on an ITFS channel unless it is interrupted from time to time to accommodate the classroom instruction requirement.⁵

Clearly, an odd pattern has evolved in the nation's communications policy. The

⁵ Even in the Washington, D.C. metropolitan area the signals of both C-SPAN and C-SPAN 2 are interrupted each day of the school year by George Mason University's Capitol Connection microwave service in order to comply with the ITFS rules.

country's only completely private national programming service devoted entirely to public affairs on a noncommercial basis has been *handicapped, rather than encouraged by its government*, even as the government attempts to compel others to do that which the C-SPAN Networks have done and will continue to do without any such prodding. Now comes a proposed rule from the Commission that would expand LCA on cable systems. Such a rule will continue the pattern by further eroding our ability to serve the public interest.

III. THE COMMISSION'S LCA PROPOSAL IS A SOLUTION IN SEARCH OF A PROBLEM: VIEWERS IN 1996 ALREADY HAVE ACCESS TO A 'DIVERSITY OF PROGRAMMING SOURCES' FROM CABLE AND ITS COMPETITORS

In support of its initiative in proposing a new LCA rate formula, the Commission cites the 1992 Cable Act's broadened statutory purpose of "the promotion of competition in the delivery of diverse sources of video programming."⁶ A mere glance at the modern television landscape demonstrates that the market has already achieved such diversity of sources as a result of vigorous competition *within* the cable industry and competition *with* the industry, thereby fulfilling the statutory mandate without need of further action by the Commission.

The current lineup of programming services not affiliated with cable MSO's, yet carried by them, is already impressive. Popular and widely distributed programming services such as A&E, the History Channel, CNBC, America's Talking, ESPN, Lifetime, The Nashville Network, the Weather Channel, the Disney Channel and Country Music Television are major programmers who have no cable operator ownership interests. Not only do they constitute a diversity of ownership, they also represent a diversity of content, another stated

⁶ See Notice at Para. 3.

statutory purpose of LCA.

The Commission should also be mindful of how cable's competitors are contributing to the diversity of programming available to viewers. In particular, the DTH satellite programmers DirecTv and PrimeStar have demonstrated business success based at least in part on the variety of programming (from diverse sources) contained in their offerings. The recently launched EchoStar and the soon-to-be launched AlphaStar services will provide cable even more competition and viewers more choices, and neither they nor DirecTv and PrimeStar will have done so at the behest of a government mandated requirement. Like their cable operator competitors, they will have delivered a diversity of programming because it is in their interests to do so. Yet, unlike their cable competition, the DTH providers are not subject to a LCA set-aside requirement. Nor are cable's other real and emerging competitors -- the so-called "wireless cable" industry and the nascent OVS -- subject to such a requirement. Regardless of the applicability of LCA to competing distributors, the marketplace has already met the statutory mandate the Commission proposes to meet through this rulemaking.

The Commission should also give strong consideration to the fact that the Congressional mandate was not for just "leased access," but for leased "commercial" access. Congress placed the LCA strictures on cable operators lest operators freeze out, for economic or editorial reasons, programming businesses in which they had no economic interest. In that event, the rejected programmers would have an opportunity to gain access by leasing capacity at a reasonable market rate. In other words, Congress did not intend a subsidy of underfunded programmers when it created the access opportunity. It intended to create only the opportunity for viable businesses to gain access that might have been inappropriately

denied.

Experience has shown, however, that few if any serious businesses willing to invest sufficient funds in the production of quality programming, and whose business plans include the reasonable cost of distribution, have also been systematically denied access to cable systems. Instead, they have either been carried by the cable operators, or they have concluded that the economics of their video programming will not support distribution by means of leased access.⁷ Experience has also shown, on the other hand, that direct marketing programs -- whose production costs are much lower -- might survive on a LCA basis, and probably even thrive on that basis if the price is low enough. Indeed, it is the distributors of direct marketing video formats such as program-length commercials (*e.g.*, for local real estate dealers, national distributors of exercise equipment, get-rich-quick investment schemes, *etc.*) and promotions for "900-number" phone services or for gambling services who are among the strongest supporters of lower LCA rates.

Thus, the economics of the video programming business are such that if the overall cost of LCA is lowered through this proceeding, the Commission will indeed be directly responsible for an increase in the diversity of programming sources on cable; but the only diversity will be among the various products and services being pitched to viewers on a 24-hour basis. In the meantime, the public service programming of the C-SPAN Networks,

⁷ For a fuller discussion of the economics of leased commercial access, see Stanley M. Besen and E. Jane Murdock, *The Impact of the FCC's Leased Access Proposal on Cable Television Program Services*, May 15, 1996, an economic study accompanying comments we submitted jointly today with Turner Broadcasting System, Inc. and News Corp. Ltd.

including the newly-launched C-SPAN 3,⁸ will be seriously cutback or disappear entirely from cable systems throughout the country.

IV. ANY DROP IN THE LCA FEE WILL LEAD TO A LOSS OF CARRIAGE FOR C-SPAN (The U.S. House) AND C-SPAN 2 (The U.S. Senate).

A. The Proposed Rate Formula Inadvertently Punishes C-SPAN's Success in Providing Low-Cost and Advertising-Free Public Affairs Television to its Distributors.

The Commission's proposed "cost/market" formula to determine the appropriate fee for LCA contains an economic disincentive for the continued carriage of the C-SPAN Networks in the face of requests for LCA. As a programming service that depends entirely on license fees from distributors for its revenues,⁹ C-SPAN represents, in the words of the *Notice*, a "net opportunity savings" to the cable operator. In other words, a cable operator will save money by bumping C-SPAN to accommodate a leased access programmer. Moreover, because the proposed formula encourages operators to drop those services representing the lowest "opportunity cost"¹⁰ to them, C-SPAN is further harmed for not carrying advertising (which would return some revenue to the cable operator), and for charging one of the lowest license fees in the industry.¹¹ Clearly, the proposed formula stacks the deck against the C-SPAN Networks. The bizarre result is that the formula transforms key elements of our success (low

⁸ C-SPAN 3 provides live coverage of high-profile events that are otherwise preempted by the House and Senate sessions being carried on the C-SPAN Networks. Pending sufficient cable system channel capacity nationwide, C-SPAN 3 is presently distributed by fiber to Washington, D.C. metropolitan area cable systems.

⁹ License fees accounted for 97% of NCSC's revenue in 1996.

¹⁰ The Commission acknowledges as much in the *Notice* at Para. 89.

¹¹ Paul Kagan Associates, *Economics of Basic Cable Networks*, 1996 Edition.

cost to the distributor, and viewer-friendly programs free of advertising) into dramatic disadvantages, to the point of being kicked off the cable system. Surely, this certain result does not advance the public interest.

B. Even at the Current Maximum Fee, the C-SPAN Networks Have Been 'Swiss Cheesed' by Leased Access.

We are confident in commenting here that *any* lessening of the cost of LCA will mean significant loss of carriage for our networks. Even under the current "highest implicit fee" approach, part-time users of leased access have bumped either or both of the C-SPAN Networks on an hourly basis. For example, in Santa Fe, New Mexico every evening in prime time C-SPAN's programming is being preempted on a leased access basis for a 2-hour local real estate agency's showcase of homes program. In Fairfield County, Connecticut, each of the C-SPAN Networks either has been or is still being preempted in favor of a variety of commercial programs, including a local home shopping service. Such preemptions have come regularly, and erratically, further frustrating our efforts to provide our audience the politically balanced and long-form programming we promised them.

We acknowledge that in this pre-digital era of limited channel capacity we have to some extent assumed the risk, along with some of our affiliated cable operators, of having the C-SPAN Networks placed on some channels that would otherwise be used to satisfy leased access requests. These examples of 'Swiss-cheesing' are offered only to demonstrate the certainty that we will face far greater carriage loss if the cost of LCA drops to *any* extent.

V. IT IS *NOT* TRUE THAT LEASED ACCESS PROVIDES C-SPAN ANOTHER MEANS OF ACCESS TO CABLE SYSTEMS.

Contrary to the impressions of some legislators and regulators, Leased Commercial

Access does *not* represent another means by which the C-SPAN Networks can be carried on cable systems. As described above, our revenues are derived almost entirely from license fees paid by our distributors. Our ability to thrive in the current video market depends on the willingness of distributors to pay us for the value the C-SPAN Networks add to their programming packages. Our non-profit business, without any other revenue source, is not premised on paying for access. Indeed, no other national programmers, including those who rely on advertising, and who operate on a for-profit basis have figured out how to operate successfully as LCA programmers.

VI. C-SPAN DOES *NOT* QUALIFY FOR THE EDUCATIONAL PROGRAMMER SET-ASIDE

Again, contrary to the impressions of some, the C-SPAN Networks do *not* benefit from the statutory provision reserving up to one third of LCA channels on a system for educational programming. Even if we were deemed an "unaffiliated" programmer for purposes of LCA, we would fail to qualify as an "educational programming source" in at least one respect. Section 612(i)(3) of the 1992 Cable Act defines such a source as one that "devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding \$15,000,000." Even if the Commission were to accept that our programming promoted either the humanities or the arts, we still would not meet the annual programming expenditure requirement. With an annual budget for all of its operations¹² at about only \$30,000,000, NCSC simply does not meet that

¹² In addition to the two fulltime C-SPAN Networks, NCSC produces the newly-launched C-SPAN 3, and the C-SPAN Audio1 and C-SPAN Audio2 services (24-hour audio services with

test, nor is it likely to do so on a per network basis in the near future.

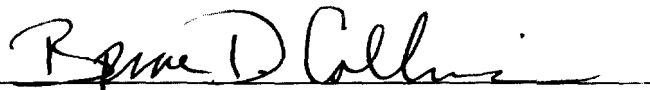
VII. CONCLUSION

The Commission has already satisfied both the statutory requirements and the legislative intent of leased commercial access. There is already a diversity of both programming and programming sources unaffiliated with cable operators on cable systems, without compelling evidence that other meritorious programmers are being excluded. Moreover, the public interest will be ill served by the certain loss of the C-SPAN Networks' public affairs programming on cable systems if there is any change in the current regulatory scheme.

Respectfully submitted,

**NATIONAL CABLE SATELLITE CORPORATION,
d/b/a C-SPAN**

By: _____



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an international focus distributed via cable). NCSC also conducts extensive "C-SPAN in the Classroom" activities across the country.